

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Carriage of the Transmissions	)	CS Docket No. 98-120
of Digital Television Broadcast Stations	)	
	)	
	)	

**REPLY COMMENTS OF OVATION, INC.**

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## Summary

Ovation strongly opposes any FCC action, such as adoption of dual must carry requirements, that would offer broadcasters even more competitive advantages than they already enjoy. Most programmers, including specialized “niche” networks like Ovation, compete in the marketplace to overcome both the barriers to market penetration all emerging networks face, as well as those resulting from regulations giving broadcasters preferred status. Broadcasters, on the other hand, urge the FCC to use the power of government to create “incentives” for them to invest in their own business. Because granting them this further leverage would substantially burden cable operators and cable programmers, and reduce opportunities for niche cable services – all without serving any legitimate government interest – the FCC must affirm its preliminary decision not to adopt dual carriage requirements.

The record does not support discriminating against cable programmers like Ovation. Unlike the analog scenario, where Congress had collected evidence indicating a threat to marginal broadcasters, no findings exist for digital must carry because the policy issues are substantially different. Here, broadcaster concerns that, absent dual carriage, DTV signals will not reach enough viewers, are misplaced. Broadcasters admit that compelling programming is the key to DTV carriage, yet they refuse to take this step without being assured marketplace rewards other programmers must work to achieve. Thus, rather than seeking regulation to level the playing field, broadcasters seek to avoid engaging in the

market competition of offering valuable programming that warrants carriage, though they are fully capable of doing so.

Dual must carry rules, meanwhile, would vastly reduce marketplace opportunities for cable programmers like Ovation, as niche programmers are particularly affected by cable capacity squeezes. Cable operators craft their lineups to attract the most subscribers. The fewer channels they have to work with – due both to the finite nature of the medium, and FCC rules that impact editorial control – the more they will dedicate to programming that appeals to broader rather than narrower audiences. This problem will not go away simply because some cable operators are increasing system capacity, as the FCC has already found that there are far more channels than even the highest-capacity systems can support.

Thus, dual carriage would undermine must carry's presumptive goals of promoting programming diversity and fair competition, especially as specialized programmers like Ovation are squeezed out. Dual carriage therefore would not serve any legitimate government interest and would violate the First Amendment. This has already been well documented by comments that show dual must carry would actually disserve the policy goals Congress enunciated and the Supreme Court relied upon for analog must carry, and that substitute objectives are either invalid or would likewise not be advanced. The FCC should thus adopt its initial determination that dual carriage would burden more cable speech than sound public policy or the First Amendment will bear.

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**REPLY COMMENTS OF OVATION, INC.**

Ovation, Inc. (“Ovation”), hereby submits reply comments in the above-captioned proceeding (“*Further Notice*”). 1/ As explained in this Reply, Ovation strongly opposes any FCC action that would confer further competitive advantages on broadcasters, as would a dual must carry requirement.

In this proceeding the proponents of dual must carry – principally broadcasters – ask the Commission to use the power of government to give them an “incentive” to invest in their own businesses. 2/ Broadcasters already have received: (i) free spectrum for their analog operations, (ii) guaranteed cable carriage of their analog signals, (iii) free spectrum for the DTV transition, (iv) guaranteed carriage for DTV (upon electing to surrender analog carriage), (v) protection from having to pay for cable carriage, (vi) guaranteed access to the basic cable tier with preferred channel placement, (vii) retransmission consent rights that can be leveraged into additional carriage for commonly owned digital and non-broadcast

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1/ *Carriage of Digital Television Broadcast Stations*, FCC 01-22, CS Docket No. 98-120 (rel. January 23, 2001).

2/ *See, e.g.*, Comments of National Association of Broadcasters/Maximum Service Television/Association of Local Television Stations at 15-17 (“NAB Comments”).

offerings, and (viii) the right to use DTV allotments for revenue-producing ancillary and supplemental services.<sup>3/</sup> Nevertheless, broadcasters now assert that such regulatory largess is insufficient, and they demand dual DTV and analog carriage to guarantee them a mass audience.

By sharp contrast, others in the television business must compete in the marketplace. As a specialized network providing high-quality arts programming, Ovation has struggled to overcome the barriers to market penetration faced by any emerging network, as well as those erected by regulations elevating broadcasters to a preferred status. Ovation has no qualms about competing head-to-head with broadcasters on a level playing field. A dual carriage requirement, however, would give broadcasters a much greater advantage than they already have. The cost of granting the further leverage broadcasters seek would be a substantial burden on cable operators and cable programmers, and a reduction in opportunities for niche cable services. As the comments in this proceeding reveal, dual carriage would exact this price without serving any legitimate government interest. The FCC should therefore affirm its preliminary decision that dual carriage rules would violate the First Amendment. *Further Notice*, ¶¶ 3, 112.

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<sup>3/</sup> See 47 U.S.C. §§ 309(j)(2)(B), 336(a)(2), 534(b)(1), (6), (10); see also generally Comments of the American Cable Association (detailing real-world examples of retransmission consent tying arrangements); Comments of Courtroom Television Network (“Court TV”) at 5 (comparing “loan” of spectrum valued at \$70 million to broadcasters to establish DTV to the billions of dollars in cable industry investment to develop digital transmission capability and use of rights-of-way); Comments of the National Cable & Telecommunications Association at 18-19 (“NCTA”) (“[c]able operators have spent billions of dollars to increase capacity”).

## **BACKGROUND**

Ovation is the sole cable television network devoted exclusively to the arts, and provides programming 24 hours a day, 7 days a week. We give viewers unprecedented access to programs on the visual arts, theater, opera, classical music and jazz, architecture, design, literature and dance. Our schedule includes documentaries on the arts, behind-the-scenes coverage of important arts events, tours of great museums and exhibitions, explorations into the arts of world cultures, profiles of best-loved and up-and-coming artists, current cultural news, and children's arts programming. Ovation features a wealth of performance and documentary-style programming, including live telecasts of operas, dramas and musical performances.

The strength and originality of Ovation's programming has been recognized with a host of international industry accolades. Among its most recent awards are Peabody and BAFTA Best Documentary Awards in 2001 for *Howard Goodall's Big Bangs*, and Best Documentary Awards the previous year from Vienne TV for *Chaliapin – The Enchanter*, and from the National Association of Minorities in Cable ("NAMIC") for *The Afro-Cuban All Stars at the Salon of Dreams*. In 1999, Ovation's awards included an International Emmy Best Documentary for *The Phil*, a Banff Rockie Best Documentary for *The Lost Frescoes*, an International Film and Video Festival Silver Screen Award for *Pollack!*, and a Muse Award for *The Museum on the Mountain*. Ovation's commitment to diversity in its programming has received recognition in the form of Vision Awards from NAMIC for not only last year's *Afro-Cuban All Stars* documentary, but also in 1998 for *Chico Hamilton*:

*Dancing to a Different Drummer* as Best Music and Variety Program. <sup>4/</sup> Educators and students have also given high praise to Ovation's Cable in the Classroom offering, ArtsZone, and its web site, [www.ovationtv.com](http://www.ovationtv.com), as significant compliments to arts and humanities curricula. Over 60 percent of Ovation's programming is copyright cleared for school use.

Ovation first undertook the challenge of initiating programming service in 1994. Although it is difficult to launch any new programming service, Ovation initially was hard hit by cable rules adopted in 1993, including analog must carry and cable rate regulation. <sup>5/</sup> After weathering these early roadblocks, Ovation was launched on April 21, 1996 to an estimated 400,000 households, and now reaches over 23 million households. The network's mission is to meet the needs of the many viewers who expect more from television, by offering programs that enrich and educate through outstanding arts programming not available anywhere else. <sup>6/</sup>

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<sup>4/</sup> Attachment A provides a complete list of Ovation's awards during these and prior years.

<sup>5/</sup> See also Comments of the C-SPAN Networks at 4 (C-SPAN was forced to shelve plans to launch C-SPAN3, C-SPAN4 and C-SPAN5 due to analog must carry, retransmission consent and rate reregulation)

<sup>6/</sup> See also Comments of Ovation, Inc., on *DTV Must Carry NPRM*, 13 FCC Rcd 15092 (1998) ("Notice"), filed Oct. 13, 1998 ("Ovation Initial Comments") at 4-5 (citing *Arts Participation in America*, U.S. Census Bureau (1992) (reporting interests of 71% of U.S. adults in increased arts participation); *Survey of Public Participation in the Arts*, Westat Corporation, (1997) (reporting that 50% of adults attended arts exhibition or performance in 1997, compared to only 41% who attended sporting events during same period)).



Notwithstanding the growth in viewers and the merit of our programming, Ovation's struggle to obtain carriage on more cable systems and improve penetration is an uphill battle. Cable capacity is finite, and its expansion has been more than matched by the growth of other cable programming services, many of which offer multiple channels of programming. In addition, cable operators now offer a range of advanced services beyond traditional cable programming that compete for bandwidth. Now, with dual carriage still under consideration, Ovation faces the possibility that our prospects for reaching additional viewers will contract. Broadcasters claim that they must be granted dual carriage rights in order to induce them to offer DTV programming of high quality. *See* NAB Comments at 16-17. Ovation submits that dual carriage rules would be profoundly unfair and anticompetitive, and that broadcasters have not made their case for such governmental favoritism.

**I. THE RECORD IN THIS PROCEEDING DOES NOT SUPPORT DISCRIMINATING AGAINST CABLE PROGRAMMERS LIKE OVATION**

At its root, must carry is nothing more than a form of discrimination between different programming providers. *See Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 645 (1994) ("*Turner I*") (noting that must carry means "[b]roadcasters, which transmit over the airwaves, are favored, while cable programmers, which do not, are disfavored"). When Congress adopted analog must carry rules, it based its decision on a collection of record evidence indicating that certain cable operators had denied carriage – and therefore cut off established viewers – to certain

marginal broadcast stations. <sup>7/</sup> Stronger broadcast stations, by contrast, were given the ability to demand compensation in exchange for retransmission consent based on the appeal of their programming. No corresponding findings exist for digital must carry, because the policy issues presented are quite different: there is no record of cable operators cutting off service because broadcasters – beginning with the largest, most powerful licensees – are building a new business from the ground up. Whatever might have been the validity of must carry rules in the analog world, in the digital context there is no justification for a policy of official favoritism for broadcasters.

Broadcasters’ demand for dual carriage is based on their concern that, without such a rule, their DTV signals will not reach enough viewers. *E.g.*, NAB Comments at 17; Comments of Public Broadcasters at 21-22. We know how they feel. However, absent regulatory preferences such as must carry rights, broadcasters and cable network programmers alike must make their programming sufficiently valuable in the marketplace to deserve carriage on cable systems. This means attracting viewers both to gain advertiser support, and to add sufficient

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<sup>7/</sup> *Turner I*, 512 U.S. at 632; *id.* at 674 (Stevens, J., concurring) (Congress conducted a “lengthy investigation of the relationship between the cable and broadcasting industries”); *Turner Broadcasting Sys. v. FCC*, 520 U.S. 180, 199 (1997) (“*Turner II*”) (Congress adopted analog must carry only after “hearing years of testimony, and reviewing volumes of documentary evidence and studies”).

value to cable system line-ups to warrant carriage – in short, engaging in the competition of the market. 8/

In this respect, broadcasters and cable networks are equally capable of taking the steps necessary to persuade cable operators to carry their programming, digital or otherwise. Although broadcasters complain that they have not yet reached many digital carriage deals, they acknowledge that it is within their power to make their programming sufficiently compelling to warrant carriage. *See* NAB Comments at 12 (“From a consumer’s perspective, the critical factor in determining value is content, *i.e.*, programming.”). The Consumer Electronics Association describes the lack of original digital programming as a “major impediment” to the transition, and adds that “cable providers will have more incentive to carry digital broadcast programming when more unique and digitally originated programming exists.” CEA Comments at 6-7. Bottom line, broadcasters admit that developing programming is the key to DTV carriage. NAB Comments at 20 (“As DTV, over time, becomes more desirable to viewers, a cable operator might carry the most popular commercial DTV broadcasters”).

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8/ As described above, Ovation has produced quality original programming in order to carve out our unique niche in the video marketplace. Others have done the same. *See* Comments of TechTV LLC at 10 (“non-broadcast programmers [are] playing an increasingly prominent role in providing news, public affairs, children’s . . . and other public interest programming”); Discovery Comments at 2 (comparing Discovery Networks’ superior overall quality rankings in EquiTrend Surveys to those of PBS, “the only broadcast entity to rank within the top 10 television brands in overall quality” and of Fox, “the top commercial broadcast entity [in] 18th place”).

In short, this proceeding does not involve the issue of market failure, but rather a failure of will. Broadcasters claim not an inability to produce compelling programming, but announce that they are *unwilling* to do so unless the FCC exerts regulatory leverage on their behalf to create an immediate mass market for DTV. 9/ Their argument is that advertising revenue alone will not justify their investment in programming, even though the Commission already dealt with this issue by granting broadcasters' request for flexible use of digital spectrum. 10/ Consequently, the comments submitted on this record provide no legitimate public policy basis for adopting a policy of official favoritism.

To be sure, the record is not devoid of allegations of anticompetitive motives on the part of cable operators. 11/ But such allegations fall far short of the standard of proof required to support duplicative must carry rules. The record com-

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9/ NAB Comments at 15-17. *See also* NCTA Comments at 10-11 (noting that (i) "broadcasters have offered precious little original digital programming," (ii) "other than CBS's prime time schedule, hardly any DTV is being broadcast," and (iii) "[i]n some cases digital television transmitters may only be turned on for certain hours of the day").

10/ *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, 12 FCC Rcd 12809, ¶ 29 (1997) ("*Fifth Report and Order*") ("We recognize the benefit of permitting broadcasters the opportunity to develop additional revenue streams from innovative digital services. This will help broadcast television to remain a strong presence in the video programming market that will, in turn, help support a free programming service. Thus, we will allow broadcasters flexibility to respond to the demands of their audience by providing ancillary and supplementary services that do not derogate the mandated free, over-the-air program service.").

11/ *See* NAB Comments at 18-21; Comments of Maranatha Broadcasting Company, Inc. ("Maranatha Comments") (suggesting a "need to limit the ability of cable operators to discriminate against [broadcast] stations").

piled by Congress and the FCC with respect to analog must carry is nearly a decade old, and related to entirely different issues. As the United States Court of Appeals for the District of Columbia Circuit recently made clear, the FCC cannot adopt rules that affect the First Amendment rights of cable operators based on a stale record or generalized allegations of anticompetitive motives. *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126, 1132-1135 (D.C. Cir. 2001). The court found that the FCC cannot assume the existence of a problem simply because it is conceivable, and held that “[c]onstitutional authority to impose some limit is not authority to impose any limit imaginable.” *Id.* at 1129-1130. Nothing in the record of the current proceeding justifies granting the regulatory leverage broadcasters seek.

## **II. A DUAL CARRIAGE RULE WOULD COMPETITIVELY HAMSTRING NICHE CABLE PROGRAMMERS LIKE OVATION**

A dual must carry rule would vastly reduce the marketplace opportunities for cable programmers like Ovation. As noted above and in its initial comments in this proceeding, Ovation has already had to grapple with analog must carry, cable rate regulation, and other regulatory impediments, in the process of building toward the 23 million household penetration Ovation currently enjoys. Ovation continues to face market pressures in the form of competition from other cable programmers, all of which are seeking carriage on a finite number of cable channels. <sup>12/</sup> We also must contend with bandwidth demands imposed by existing

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<sup>12/</sup> See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 01-1 (rel. Jan. 8, 2001) (“*Video Competition Report*”) at 101 (reporting 214 available networks), Table D-4 (reporting 66 new planned programming services).

analog must carry as well as the introduction of new non-network services that take up capacity. In this environment a dual carriage requirement would further reduce the number of available channels for which Ovation can compete. 13/

There is no doubt that video programming networks at all levels share these concerns – both those with high penetration and those that are becoming mature. But specialized networks like Ovation are particularly affected by cable capacity squeezes. At the end of the day, cable operators will endeavor to assemble lineups that attract the most subscribers. The fewer channels they have to work with – due both to the finite nature of the medium, and to regulatory requirements that impact editorial control – the more channels they will dedicate to programming that appeals to broader rather than narrower audiences. This means that the number of niche programmers they carry, which are by definition directed toward narrower segments of the market, will be limited. *Accord*, Comments of International Cable Channels Partnership, Ltd. (“ICCP”), at 8-12 (“cable system capacity remains limited, and dual carriage will squeeze out specialized cable networks”). 14/

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13/ The National Cable and Telecommunication Association provided evidence that 80 percent of cable customers subscribe to systems with three or fewer available channels, while more than half subscribe to systems with no available channels. NCTA Comments at 17.

14/ Niche broadcasters apparently share the concerns of cable programmers with regard to falling victim to a numbers crunch during the digital transition. *See, e.g.*, Comments of KSLs, Inc. and KHLS, Inc. (“KSLs”), at 2-3; Comments of Entravision Holdings, LLC, at 6. As we show in the text, however, the solution is not granting the broadcasters an unjustified advantage over cable programmers like Ovation (beyond the analog must carry advantage already enjoyed, *see, e.g.*, KSLs at 2). Rather, the answer is forcing each niche programmer to compete on equal footing for limited cable capacity resources. This is particularly appropriate since

Thus, a dual must carry requirement that leaves cable operators even fewer channels than are already available under the prevailing regime to dedicate to niche programmers will disproportionately affect cable networks like Ovation. This will undermine the presumptive goal of the must carry rules of promoting diversity of programming because it will supplant networks such as Ovation with simulcasts of broadcast programming during the transition. <sup>15/</sup> It will also subvert to principle of fair competition by granting broadcasters' request for a guarantee of marketplace success while handicapping competitive programming services that lack such assistance.

Broadcasters' principal response is to point to increases in cable channel capacity and to assert that the growth is sufficient to accommodate both the burgeoning number of competitive networks and services in addition to those who would reserve their place by regulatory fiat. *See* NAB Comments at 29-34. Their position is more than a little ironic – broadcasters claim that the cable industry can be saddled with additional regulatory requirements because cable has made the investments in digital that broadcasters are unwilling to make without government assistance. In any case, their factual claim, that growth in capacity

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programmers like KSLs and Entravision are guaranteed carriage for their DTV offerings upon surrender of their analog allotment, while Ovation enjoys no such guarantees or choices.

<sup>15/</sup> *Further Notice*, ¶ 68 (citing *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, 12 FCC Rcd 12809, 12832 (1997) (requiring each DTV station to simulcast 50% of its analog counterpart's programming by April 21, 2003, 75% by April 21, 2004, and 100% by April 1, 2005)).

will solve the problem, is incorrect. Even the largest 750 MHz cable systems lack the capacity to carry the programming services that already are available, not counting other non-programming services. 16/ Consequently, any dual must carry rule would have a significant adverse effect on networks such as Ovation.

### **III. DUAL CARRIAGE WOULD NOT SERVE ANY LEGITIMATE GOVERNMENT INTEREST AND WOULD VIOLATE THE FIRST AMENDMENT**

Ovation agrees with the comments filed by others who have shown that a dual carriage requirement would not advance any government interest relevant to the Cable Act's must carry provisions, and that such a rule would therefore not withstand constitutional scrutiny. 17/ Other cable programmers likely to be harmed by dual carriage have shown that dual must carry would actually *disserve* the policy goals the Supreme Court identified in narrowly upholding analog must carry, and that substitute objectives are either invalid or would likewise not be advanced by dual carriage. 18/ Ovation submits that, given the preliminary finding that "on the current record, a dual carriage requirement may burden cable operators' First Amendment interests more than is necessary" to further the interests dual carriage might promote, *Further Notice*, ¶¶ 3, 112, the FCC cannot

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16/ A 750 MHz cable system has the capacity to carry 115.6 MHz channels, and the number of available networks is nearing 280. *See supra* note 12.

17/ NCTA Comments at 6-13; Comments of Time Warner Cable at 3-20; Comments of AT&T Corp. at 11-22; A&E at 4-13; Court TV Comments at 17-20; Discovery Comments at 3-6; HBO Comments at 3-7.

18/ A&E Comments at 9-13; Court TV Comments at 7-17; Discovery Comments at 5-6; ICCP Comments at 6-8.



constitutionally justify adopting a dual must carry requirement for the digital transition.

### **CONCLUSION**

For the foregoing reasons, Ovation respectfully requests that the Commission affirm its tentative conclusion not to adopt a dual carriage requirement for the DTV transition.

Respectfully submitted,

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By \_\_\_\_\_  
Dr. Harold E. Morse  
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August 16, 2001

**ATTACHMENT A**